85-206

No. .....

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1984

—o—

JOE PASCARELLA,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
Attorneys for Petitioner
P.O. Box D
El Paso, TX 79951-0004
(915) 544-7860

MICHAEL VIGIL
Attorney for Petitioner
P.O. Box 568
Albuquerque, NM 87103
(505) 247-0751

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

WHETHER THE RULE SET DOWN BY THIS COURT IN *GEORGIA V SIMS* WHICH REQUIRES A TRIAL COURT TO MAKE AN EXPLICIT FINDING OF VOLUNTARINESS OF A CONFESSION AFTER THE ISSUE WAS RAISED SHOULD REMAIN THE LAW IN THE STATE OF NEW MEXICO.

WHETHER A DEFENDANT MAY BE CONVICTED UPON JURY INSTRUCTIONS WHICH BY ITS LANGUAGE ALLOWED CONVICTION UPON A FINDING OF NON-CRIMINAL CONDUCT IN THE ABSENCE OF OBJECTION BY DEFENDANT'S COUNSEL.

WHETHER COUNSEL FOR DEFENDANT RENDERED INEFFECTIVE ASSISTANCE WHEN HE PARTICIPATED IN THE FORMULATION OF JURY INSTRUCTIONS AND FAILED TO OBJECT TO JURY INSTRUCTIONS WHICH ALLOWED HIS CLIENT TO BE CONVICTED UPON A FINDING OF THE SOLE DEFENSIVE ISSUE COUNSEL RAISED AT TRIAL, AND WHICH ALLOWED HIS CLIENT TO BE CONVICTED UPON A FINDING OF NON-CRIMINAL CONDUCT.

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PETITION FOR WRIT OF CERTIORARI

—o—

The Petitioner, Joe Pascarella, petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of New Mexico in this case.

—o—

CITATION TO OPINIONS BELOW

The denial of Certiorari by the New Mexico Supreme Court on June 6, 1985 in the same case is not reported and is reproduced here as Appendix A. The memorandum opinion of the Court of Appeals of the State of New Mexico in *State v. Pascarel'a,* No. 7735 (April 25, 1985) is not reported and is reproduced herein as Appendix B.

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JURISDICTION

The *Memorandum Opinion* of the New Mexico Court of Appeals was entered on April 25, 1985. A timely petition for a writ of certiorari was denied by the Supreme Court of New Mexico on June 6, 1985. This petition is timely filed within sixty days of June 6, 1985 pursuant to Supreme Court Rule 20.1. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. V provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . .

U.S. Const., Amend VI provides in pertinent part:

> In all prosecutions, the accused shall enjoy the right . . . to have assistance of Counsel for his defense.

U.S. Const., Amend. XIV provides in pertinent part:

No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . .

———o———

STATEMENT OF THE CASE

A. The course and proceeding in the courts below:

This Petitioner was indicted in Dona Ana County, New Mexico in a complaint charging him with one count of "criminal solicitation" . . . [to commit] "Felony aggravated battery," Sec. 30-3-5 and Sec. 30-28-3, N.M.S.A. (1978), (R.P. 1).[1] Following a Jury Trial in Cause No. CR-83-76, Galvan, J. Presiding. Petitioner was convicted of this offense in a Judgment filed on February 27, 1984 (R.P. 107), and was sentenced to 18 months confinement and 12 months parole (R.P. 107). A *timely Motion to Modify* sentence was filed on February 29, 1984, (R.P. 103), and denied on March 5, 1984, (R.P. 116).

The New Mexico Court of Appeals affirmed the conviction of the Petitioner on April 25, 1985, holding that: (1) jurisdictional or fundamental error as to the charge was not committed because the charge adequately defined the essential elements of the crime and the misleading definition was an extraneous matter introduced by defense counsel, *Pascarella,* slip opinion at 3-6, App. B at App. 4-8; (2) an implicit finding of voluntariness was sufficient, *Pascarella,* slip opinion at 8-9, App. B at App. 10-12; and

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[1] There was a second count which was dismissed by the State prior to trial, (3A-0009)

(3) the Defendant was accorded adequate representation of counsel, *Pascarella,* slip opinion at 9-10, App. B at App. 12-13.

Subsequently, the New Mexico Supreme Court denied a timely Petition for Certiorari without opinion on June 6, 1985, see App. B.

B. Statement of the Facts:

Agent Daniel Garcia testified that he was an undercover Law Enforcement Officer posing as a "hit man," (3A-1213).[2] The agent testified that he contacted the Petitioner through the offices of a third person and that Petitioner wanted the agent to break an "arm or leg" of one Sammy Puentes, (3A-2143), for which the Petitioner was to pay the agent $500.00 (3A-2266). According to the agent, Petitioner gave him five (5) $100.00 bills torn in half (3A-2800). The agent further testified that the Petitioner wanted "Puentes" to spend some time in the "hospital," (3A-3970). The agent testified that he told the Petitioner that he would "break" Sammy Puentes' "legs," (3A-2926). The agent then related that later when he told Petitioner that he had finished the job, the Petitioner "coughed up" the other halves of the five (5) $100.00 bills, (4A-0041).

Darrell Allred testified that he was "a criminal investigator for the New Mexico State Police," (6A-3031, 7A-0001), and that in this capacity he met with the

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[2] The citations above are citations to the taped recordings of the trial, etc. which comprises the official record in this cause; pursuant to Rule 92, N.M. Rules of the District Court, the trial court can opt to have the proceedings taped instead of transcribed by a court recorder. This was done in this case.

agent Garcia on May 5th, 1983 (7A-0001 et seq.). Darrell Allred further testified that after the arrest of the Petitioner that he warned the Petitioner and then interviewed the Petitioner regarding the facts, (7A-0510). Petitioner's counsel voir dired State witness Allred regarding the voluntariness of any statement made by Petitioner, (7A-510). After Petitioner's counsel elicited testimony that the officer had elicited an inculpatory statement or confession from the Petitioner, Petitioner's counsel objected to admission of the statement on the grounds of "improper warnings" and lack of "voluntariness" and the trial court overruled such objections stating: "the voluntariness of the statement will be considered by the jury and the objection is overruled at this time," (7A-1358 et seq.).

At the close of the State's case, counsel for Petitioner moved for a directed verdict on the grounds the evidence was insufficient, (8A-0850).

Joseph Pascarella, Petitioner herein, testified that before giving the statement the Petitioner told Agent Allred that he "felt" he needed an attorney; however, Agent Allred then told him that if "the [Petitioner] would show that he really didn't want to hurt Sammy or . . . remorseful," that the agent would do what he could to get him charged with a misdemeanor, (9A-1322). According to the Petitioner, it was on this basis that he gave the statement, (9A-1380).

At the closing and resting of both sides, Petitioner's counsel renewed his Motion for a directed verdict of acquittal (12A-0030).

Following the conclusion of the evidence the Court instructed the jury as follows:

"Ladies and gentlemen of the Jury, you have heard all the evidence. It is now my duty to tell you the law that you must follow in this case. For you to find the Defendant guilty of criminal solicitation, the statements prove to your satisfaction, beyond a reasonable doubt each the the following elements of the crime:

1. The Defendant intended that another person commit aggravated battery;

2. That the Defendant employed the other person to commit the crime;

3. This happened in New Mexico on or about the 5th day of May, 1983.

In New Mexico, the elements of the crime of aggravated battery are as follows:

1. Injury is done to a victim;

2. This injury is done intentionally;

3. The injury amounts to great bodily harm.

Great bodily harm means an injury to a person which creates a high probability of death, or results in serious disfigurement, or results in loss of any member or organ of the body, or results in permanent or prolonged impairment of the use of any member or organ of the body.

In New Mexico, there is a lesser degree of simple aggravated battery when the injury does not amount to great bodily harm but which injury although not likely to cause death, does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body."

Following this instruction, the Jury deliberated and convicted the Petitioner.

C. The raising of questions presented in the Courts below:

The Petitioner raised the issue of voluntariness of his confession by objection at trial, (7A-510; 7A-1340 et seq). In his *Appellant's Brief* to the New Mexico Court of Appeals the Petitioner argued that it was a "constitutional requirement for the trial judge to make a definitive ruling on the issue of voluntariness" citing *Simms v Georgia,* 385 U.S. 538 (1967) and *Jackson v Denno,* 378 U.S. 368 (1964), *Appellant's Brief,* at pp. 12-13. The Petitioner also quoted *Simms* for the proposition:

> *Jackson,* having been decided June 22, 1964, was binding on the courts of Georgia in this case, it having been tried October 7, 1964. Such rule is, as we have said, a constitutional rule binding upon the States and, under the Supremacy Clause of Article VI of the Constitution, it must be obeyed.
>
> *Simms,* at 385 U.S. at 544; quoted in *Appellant's Brief,* at p. 13.

In regard to the question as to whether the misleading jury instruction was jurisdictional and fundamental error, trial counsel below did not object at trial; however, Appellate counsel presented the question in his *Appellant's Brief* citing *Screws v United States,* 325 U.S. 91 (1945).

In regard to the question as to whether the Petitioner was accorded effective assistance of counsel, the issue, for obvious reasons was not raised at trial. After the record was supplemented on appeal to show that trial counsel authored the crucial, misleading jury instruction himself, Appellate counsel was permitted to supplement his appellate issues by arguing in his *Appellant's Supple-*

mentary Brief, at p. 4 et seq, that the Petitioner was denied effective assistance of counsel, stating:

> Under both the New Mexico *Constitution,* Art 2 Sec. 14 and the United States *Constitution,* Amend. VI, an accused is entitled effective representation of counsel, *State v Robinson,* 99 N.M. 674, 662 P.2d 1341(N.M. 1983); see also *Griffin v Winans,* 684 F.2d 683 (10th Cir. 1982).

The three issues above were reurged in the Petition for Certiorari to the New Mexico Supreme Court, *Petition for Certiorari (New Mexico),* at pp. 6-7; 3-6; and 7-10 respectively.

I

NEW MEXICO HAS NOT ACCEPTED THE RULE SET DOWN BY THIS COURT IN SIMMS V GEORGIA TO THE EFFECT THAT A TRIAL JUDGE MUST MAKE AN EXPLICIT AND DEFINITIVE FINDING AS TO THE VOLUNTARINESS OF A DEFENDANT'S CONFESSION BEFORE ADMITTING SUCH CONFESSION INTO EVIDENCE.

A. Raising the issue.

Joseph Pascarella, Petitioner herein, testified that before giving his confession that he had told Agent Allred that he "felt" he needed an attorney; however, Agent Allred then told him that if "the [Petitioner] would show that he really didn't want to hurt Sammy or . . . remorseful," that the agent would do what he could to get him charged with a misdemeanor, (9A-1322). According to

the Petitioner, it was on this basis that he declined an attorney and gave the statement, (9A-1380). Petitioner's counsel objected at trial to that admission of the statement on the grounds of "improper warnings" and lack of "voluntariness" and the trial court overruled such objections stating: "the voluntariness of the statement will be considered by the jury and the objection is overruled at this time," (7A-1358 et seq).

B. The conflict between *Simms v Georgia* and the New Mexico voluntariness cases.

In *Simms v Georgia,* 385 U.S. 538 (1967), this Court confronted a factual situation whereby defense counsel objected to admission of the Defendant's confession on voluntariness grounds, a hearing out of the presence of the jury was held and the objection was overruled by the trial judge:

> Prior to trial petitioner filed a motion to suppress the confession as being the result of coercion. A hearing was held before the court out of the presence of the jury. . . . The court denied the motion to suppress without opinion or findings and the confession was admitted into evidence at petitioner's trial.
>
> *Simms,* 385 U.S. 540-541

After examining this procedure and rejecting it, Justice Clark made the holding of this Court perfectly clear:

> Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity. Here there has been absolutely no ruling on that issue and it is therefore impossible to know whether the judge thought the confession voluntary or if the jury considered it as such in its determination of guilt. Jackson, having been

> decided June 22, 1964, was binding on the courts of Georgia in this case, it having been tried October 7, 1964. Such rule is, as we have said, a constitutional rule binding upon the States and, under the Supremacy Clause of Article VI of the Constitution, it must be obeyed.
>
> *Simms,* 385 U.S. 544

This Court's ruling in *Simms* has not been obeyed by the New Mexico Courts in a line of cases culminating in this one:

> Therefore, it is necessary that a determination be made by the court respecting the voluntariness of a confession, and we reiterate the admonition in Pinto that "it would seem prudent to hold voluntariness hearings outside the presence of the jury." Although there is lacking in this case a specific announcement by the court, when the total circumstances as shown by the record are considered, we are of the opinion that the trial court made such a determination. It is implicit in the court's offer above noted, together with the subsequent instruction to the jury that they should disregard the statements if they determined it to be involuntary, that the necessary determination was made. Obviously, such an instruction would not have been given if the court had the slightest question of the voluntariness of the confession.
>
> *State v Solis,* 79 N.M. 263, 442 P.2d 575, 578 (N.M. 1968)

> Defendants next contend that the trial court failed to rule as a matter of law whether the statement was voluntary or involuntary before its submission to the jury. The record does not support the contention. The trial court conducted a hearing outside the presence of the jury as to the voluntariness of the statement and, at the close of the hearing, the court announced, . . . The confession . . . will be received . . ." We see no ambiguity or uncertainty as to the trial

court's ruling. See Pece v Cox, 74 N.M. 591, 396 P.2d 442. If defendants were in doubt as to the trial court's ruling they should have sought clarification. They did not find it necessary to complain at the trial, nor do we see merit to their position.

State v Beachum, 78 N.M. 390, 432 P.2d 101, 102 (N.M. 1967)

Here, as in State v Burk, supra, there is superficial support in the record for the claim that the trial court did not adequately determine the admissibility of the statement. Here, as in Burk, there is no specific ruling on disputed factual issues. At one point, the trial court remarked: " . . . the Court is ruling that there is enough evidence to go to the jury under proper instructions . . . ." At another point, the trial court stated: "I'm not ruling there was no coercive element. That is a question of fact for the jury, ..."

However, the trial court conducted a pretrial hearing on the admissibility of the statement. After hearing the evidence, it ruled " . . . as a matter of law there is enough evidence to go to the jury . . .", and that the statement would be admissible at trial. His findings on disputed factual issues are clearly ascertainable from the record; it is clear, from the court's remarks, that it believed the officer's testimony and did not believe the defendant. The trial court's remarks, in context, are that the statement was obtained in compliance with legal requirements and was admissible although the final decision concerning the statement was for the jury. State v Burk, supra; compare State v Soliz, 79 N.M. 263, 442 P.2d 575 (1968).

State v Stout, 82 N.M. 455, 483 P.2d 510, 511 (N.M. Ct. App. 1971)

Viewing this thriving line of precedents opposed only by the thin reed of a United States Supreme Court holding squarely on point, there is no wonder that the New

Mexico Court of Appeals affirmed the "implicit" proceeding employed in the trial court below:

> The jury passes on the voluntariness of a confession only after the judge has resolved the issue against an accused. *State v Burk,* 82 N.M. 466, 483 P.2d 940 (Ct. App.1971). The judge's findings upon the disputed issues of fact must be expressly stated or ascertainable from the record. *Id.* An explicit announcement by the trial court on the voluntariness issue is not necessary where the total circumstances as shown by the record lead to the conclusion that such a determination was made. *State v Soliz,* 79 N.M. 263, 442 P.2d 575 (1968). We hold that the trial court made a sufficient determination on the disputed issues. . . . The next day, before the jury, the judge overruled defendant's objection to Allred's testimony regarding defendant's statement, on the ground that the statement was not voluntary. The judge stated, "The voluntariness of the statement will be considered by the jury. The objection is overruled at this time. You may proceed." The trial judge's overruling of defendant's objection and his decision that the jury would consider the statement evidences that he had resolved the issue against defendant. *See State v Soliz; accord State v Beachum,* 78 N.M. 390, 432 P.2d 101 (1967), *cert. denied,* 392 U.S. 911 (1968); *State v Stout,* 82 N.M. 455, 483 P.2d 510 (Ct.App.1971).
>
> *State v Pascarella,* Memorandum Opinion, No. 7735 (N.M. Ct. App. April 28, 1985), at pp. 8-9; App. B at App. 10-12.

C. Conclusion

This court should either compel the New Mexico Courts to conform to the law of the land or else overrule its own decision in *Simms.* The long line of New Mexico cases which resulted in this case will not go away through wishful thinking or the passage of time.

II

THE PETITIONER WAS DEPRIVED OF A FAIR TRIAL AND DUE PROCESS BY A JURY INSTRUCTION WHICH ALLOWED HIS CONVICTION UPON A FINDING OF INNOCENT CONDUCT.

A. The jury instruction was misleading as to the elements of the offense.

The Court gave the following instructions regarding the elements of the offense:

> "Ladies and gentlemen of the jury, you have heard all the evidence. It is now my duty to tell you the law that you must follow in this case. For you to find the Defendant guilty of criminal solicitation, the statements prove to your satisfaction, beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The Defendant intended that another person commit aggravated battery;
>
> 2. That the Defendant employed the other person to commit the crime;
>
> 3. This happened in New Mexico on or about the 5th day of May, 1983.
>
> In New Mexico, the elements of the crime of aggravated battery are as follows:
>
> 1. Injury is done to a victim;
>
> 2. This injury is done intentionally;
>
> 3. The injury amounts to great bodily harm.
>
> Great bodily harm means an injury to a person which creates a high probability of death, or results in serious disfigurement, or results in loss of any member or organ of the body, or results in permanent or prolonged impairment of the use of any member or organ of the body.

> In New Mexico, there is a lesser degree of simple aggravated battery when the injury does not amount to great bodily harm but which injury although not likely to cause death, does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body." (12A-0030 et seq).

B. The legal basis.

The problem with the above instruction is that the New Mexico Penal Law against criminal solicitation does not encompass criminal solicitation to commit a misdemeanor, 30-28-3(E), N.M.S.A. (1983 Sup.). The statute stops at fourth and third degree felonies, 30-28-3(E), N.M.S.A. (1983 Sup). Thus, the second form of aggravated battery does not meet the requirements of the offense of criminal solicitation because it is only a misdemeanor. The problem with this case is that the jury was not told of this distinction and instructed only that they had to find "aggravated battery," (12A-00063 et seq). Therefore, the instruction as given allowed the jury to find the Petitioner guilty upon proof of conduct which satisfied the second form of aggravated battery even though such conduct not be a violation of the statute charged, 30-28-3, N.M.S.A. (1983 Sup).

These instructions were not objected to by trial counsel; however, the New Mexico Courts have held that a failure to adequately set out the essential elements of the offense is a fundamental error, is jurisdictional, and may be raised on appeal for the first time, *State v Gunzelman,* 85 N.M. 295, 512 P.2d 55, 60 (N.M. 1973). See also *State v Walsa,* 81 N.M. 65, 463 P.2d 41 (N.M. Ct. App. 1969); *Screws v United States,* 325 U.S. 91 (1945). In this case,

where the jury was instructed in such a manner as to allow a conviction upon proof of conduct which was not criminal under the law, there are even more compelling reasons for the courts to address the issue even though not raised in the trial court below.

Solicitation is an inchoate offense and as such includes within its elements the elements of the offense intended, LaFave and Scott *Criminal Law* (1972) at pp. 418. The authors of the treatise above pointed out that:

> Although the crime of solicitation might be defined quite simply as asking another person to commit an offense, this does not adequately reflect either the mental element or act which must exist in order for the crime to be completed.
>
> LaFave and Scott at 918

And in viewing a starkly similar hypothetical case, the authors note:

> . . . where the prohibited result involves special circumstances as to which a mens rea requirement is imposed, the solicitor cannot be said to have intended that result unless he personally had this added mental state. For example, assume a jurisdiction with the usual misdemeanor of battery and also a felony of aggravated battery, defined in part as inflicting bodily harm upon a person known to be a peace officer. If A, not knowing that C was an officer, asked B to do bodily harm to C, then A has solicited a battery rather than an aggravated battery. (Footnotes omitted)
>
> LaFave and Scott at 918-919

This requirement is especially important in New Mexico where it is not an offense to solicit certain grades of offenses. For instance criminal solicitation to commit theft

does not state an offense inasmuch as some decrees of theft are misdemeanors and thus not crimes. It is for this reason that the charge in this cause should read: criminal solicitation to commit *felony* aggravated battery, a distinction ignored by the trial court in its charge below. Thus, the question of fact as to whether the Petitioner intended the commission of "great bodily harm" is the crux of the offense. It is not definitional. The definition of "great bodily harm" is definitional. "Great bodily harm" itself is an element of the offense because it is part of the criminal intent or *mens rea* of the offense charged. An instruction drawing no distinction between "great bodily harm" and lesser serious bodily injury as bases upon which a conviction may stand is not making a "definitional" error. It is not adequately setting forth the elements of the offense. Failure to provide an adequate rendition of the essential elements of an offense coupled with possibility that conviction could be based on innocent conduct is a violation of the Petitioner's rights to a fair trial and due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

III

THE PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL

A. The factual basis.

Because of the extreme lack of evidence supporting the proposition that the Petitioner intended to solicit "great bodily harm" inflicted upon the purported victim as against lesser serious harm, trial defense counsel ap-

parently wished to include an instruction on misdemeanor aggravated battery, to wit:

> Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.
>
> 30-3-5(B) N.M.S.A. (1978)

Counsel obviously did this in order to indicate to the jury that solociting serious injury falling short of "great bodily harm" was a lesser offense (or actually innocent conduct). Thereafter, counsel did not object to the completed charge.

The problem with the above instruction is that the New Mexico Penal Law against criminal solicitation does not encompass criminal solicitation to commit a misdemeanor, 30-28-3(E), N.M.S.A. (1983 Sup). The statute stops at fourth and third degree felonies, 30-28-3(E)—, N.M.S.A. (1983 sup). Thus, the second form of aggravated battery does not meet the requirements of the offense of criminal solicitation because it is only a misdemeanor. The problem with this case is that the jury was not told of this distinction and instructed only that they had to find "aggravated battery," (12A-0063 et seq). Therefore, the instruction as given orally and in writing allowed the jury to find the Petitioner guilty upon proof of conduct which satisfied the second form of aggravated battery even though such conduct not be a violation of the statute charged, 30-28-3, N.M.S.A. (1983 sup).

B. The law:

Under both the New Mexico *Constitution,* Art. 2 Sec. 14 and the United States *Constitution,* Amend. VI, an ac-

cused is entitled effective representation of counsel, *State v Robinson,* 99 N.M. 674, 662 P.2d 1341 (N.M. 1983); see also *Griffin v Winans,* 684 F.2d 683 (10th Cir. 1982).

Should this Court find that the misleading nature of the Court's charge as a whole should be blamed upon the submission of jury instruction No. 4 by trial defense counsel, Petitioner would argue that such conduct must amount to *per se* ineffective assistance of counsel. In a close case such as this where the issue of whether the accused intended "great bodily harm" or merely serious but lesser harm was determinative of guilt or innocence, how should we judge a defense counsel's actions in submitting an instruction which had the effect of instructing the jury that they could convict upon a showing of *either* great bodily harm or lesser bodily harm? In other words, what level of competence or effectiveness is demonstrated by a defense counsel submitting an instruction which had the effect of instructing the jury that they could convict upon a showing of *either* great bodily harm or lesser bodily harm? In other words, what level of competence or effestiveness is demonstrated by a defense counsel submitting an instruction which has the effect of transforming the *defense* he is presenting at trial into an alternative *basis for conviction?* Would not such an action transform defense counsel into a second prosecutor. And even this view ignores the fact that the first (and real) prosecutor would not have been able to submit such an instruction because it would be contrary to the clear language of the statute. If a prosecutor has a duty to the court and the law not to submit an instruction which would allow conviction of accused upon a basis not authorized by law, should not this duty be extended to defense counsel as

well inasmuch as he is technically on the side of the accused.

The Petitioner argues that such actions made a mockery out of what should have been a strong defense and in all probability such actions resulted in the verdict of guilty. The Petitioner had previously argued to the New Mexico courts in his *Appellant's Brief,* at pp. 9-11 that the evidence was insufficient as a matter of law to support a finding that he solicited "great bodily harm" as against lesser injuries and argued this before the issue of ineffective assistance of counsel arose. The importance of converting an issue wherein the Petitioner contends below that he is entitled to a verdict as a matter of law into an alternative basis for his conviction cannot be minimized. Therefore, Petitioner contends that he was denied effective assistance of counsel, *U.S. Const.,* Amend. VI, *N.M. Const.,* Art. 2 Sec. 14; *Robinson, supra; Griffin, supra.*

C. The decision of the New Mexico courts ignores and is in conflict with this court's decision in *Strickland v Washington,* 466 U.S. —, 104 S. Ct. 2052, 80 L.Ed 2d 674 (1984)

In the instant case as in *Evitts v Lucey,* 469 U.S. —, 105 S. Ct. —, 83 L.Ed. 2d 821, 827 (1985), a single crucial error rendered counsel's assistance ineffective. In our case, counsel sought to include a defensive issue in the charge and because of his failure to provide or request additional instructions or explanations which would have identified the issue as a defensive issue as against an alternate basis for conviction, counsel was responsible for a complete jury charge which authorized conviction on non-criminal conduct, which authorized conviction on the very facts that counsel was presenting as a *defense.* This demonstrates that counsel's performance was not a tactical

choice, and that counsel's performance resulted in prejudice that could have altered the outcome of the trial, *Strickland,* 104 S. Ct. at 2064. To prove this point by example, would the *Strickland* standard be violated if a defense counsel presented "self defense" as a sole defense at a murder trial; included a "self defense" definition in the charge; but failed to supply or request explanatory instructions so that the complete charge authorized conviction upon a finding of self-defense? This is the situation here. The Petitioner's rights under the Sixth Amendment as guaranteed by the Fourteenth Amendment were violated.

—o—

CONCLUSION AND PRAYER

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Petitioner prays that this court grant a Petition for Certiorari to the Supreme Court of New Mexico, and thereafter reverse this Petitioner's conviction and remand this cause for a new trial or in the alternative, a hearing below on the issues presented herein.

Respectfully submitted,

JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
Attorneys for Petitioner
P.O. Box D
El Paso, TX 79951-0004
(915) 544-7860

MICHAEL VIGIL
Attorney for Petitioner
P.O. Box 568
Albuquerque, NM 87103

APPENDIX A

DENIAL OF CERTIORARI BY THE SUPREME COURT FOR THE STATE OF NEW MEXICO
IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Thursday, June 6, 1985

NO. 15,893

JOE PASCARELLA,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

(Filed June 10, 1985)

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 7735 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY:

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX B

OPINION OF THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

No. 7735

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

JOE PASCARELLA,

Defendant-Appellant.

(Filed April 25, 1985)

APPEAL FROM THE DISTRICT COURT
OF DONA ANA COUNTY
Joe H. Galvan, Judge

PAUL G. BARDACKE, Attorney General
ELIZABETH MAJOR, Ass't Attorney General
Santa Fe, New Mexico

Attorneys for Plaintiff-Appellee

JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
El Paso, Texas
MICHAEL E. VIGIL
MARCHIONDO & BERRY, P.A.
Albuquerque, New Mexico

Attorneys for Defendant-Appellant

MEMORANDUM OPINION

MINZNER, Judge.

Defendant appeals his conviction of criminal solicitation to commit felony aggravated battery, contrary to

NMSA 1978, Sections 30-28-3 and 30-3-5 (Repl.Pamp.1984). We affirm.

On appeal, defendant contends that the trial court committed jurisdictional or fundamental error in instructing the jury and that there was insufficient evidence of great bodily harm, an essential element of the crime charged. Defendant also contends that the trial court failed to make a sufficient determination of the voluntariness of defendant's statement to police before submitting the issue to the jury. Finally, defendant contends he was denied effective assistance of counsel.

Defendant filed his reply brief one day late, moving on the due date for an appropriate extension of time. We grant that motion; we have considered the responses made in the reply brief.

FACTS

Defendant allegedly hired an undercover police officer posing as a "hit man" (Garcia) to injure defendant's supervisor (Puentes). Unknown to defendant, Puentes became involved in the undercover operation at an early stage. Further, most of defendant's conversations with Garcia were recorded.

In the early afternoon of May 5, defendant met with Garcia in a hotel room. At that time defendant hired Garcia, although they previously had discussed arrangements. Defendant tore five $100 bills in half, gave Garcia five of the halves, and told him that the remaining halves would be delivered after the "hit" was consummated. Garcia told defendant that the hit would occur that day, or

that night, and he called defendant later the same day to tell him the hit had occurred.

After defendant's meeting with Garcia on May 5, Puentes left the office where they both worked. The same afternoon defendant was told that Puentes had been seriously injured and was being transferred to an El Paso hospital. Although Puentes had not really been injured, defendant made several calls and believed he had verified some of the details concerning the hit.

That evening, defendant met with Garcia and delivered the remaining halves of the $100 bills. Three or four police officers then appeared, and defendant was arrested. Defendant was advised of his rights and taken to police headquarters.

Defendant gave police a statement which admitted solicitation of Garcia; however, he contended that he initially believed Garcia was a "political insider" who could help defendant by exercising his influence. Defendant maintained that subsequently he became convinced Garcia was a hit man and believed he would not permit defendant to withdraw the offer. Consequently, defendant did not withdraw from the arrangement through fear.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY

The record indicates that defendant did not object to the court's instructions. He cannot object for the first time on appeal, absent jurisdictional or fundamental error. *See State v. Urban,* 86 N.M. 351, 524 P.2d 523 (Ct.App. 1974). On appeal defendant contends that such error oc-

curred. Defendant argues, first, that the trial court failed to instruct on the essential elements of the crime, *State v. Gunzelman,* 85 N.M. 295, 512 P.2d 55 (1973); and, second, that the instructions given confused the jury, resulting in a meaningless verdict. *See State v. DeSantos,* 89 N.M. 458, 553 P.2d 1265 (1976); *State v. Buhr,* 82 N.M. 371, 482 P.2d 74 (Ct.App.1971). We are not persuaded by either argument.

Failure to instruct the jury on every essential element of the crime charged is jurisdictional error. *State v. Gunzelman.* Defendant contends that this failure occurred in the present case because jury instruction 1 did not list the essential elements of felony aggravated battery, and because neither instruction 1 nor 2 contained the phrase "felony aggravated battery." The instructions given as a whole, however, substantially followed the language of the relevant statute or used equivalent language. Therefore, the instructions were sufficient. *Id.*

Instruction 1 followed the language of NMSA 1978, UJI Crim. 28.28 (Cum.Supp.1984). The instruction provided:

> For you to find the defendant guilty of criminal solicitation, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant intended that another person commit aggravated battery;
>
> 2. The defendant employed the other person to commit the crime;
>
> 3. This happened in New Mexico on or about the 5th day of May, 1983.

Instruction 2 then instructed the jury on the essential elements of aggravated battery.

> In New Mexico, the elements of the crime of aggravated battery are as follows:
>
> 1. Injury is done to a victim;
> 2. This injury is done intentionally;
> 3. The injury amounts to great bodily harm.

Although instruction 2 does not employ the language of the relevant uniform jury instruction on aggravated battery with great bodily harm, *see* NMSA 1978, UJI Crim. 3.53 (Repl.Pamp.1982), it substantially follows the language of the felony aggravated battery statute, *see* Section 30-3-5(C). Under these circumstances, the instruction sufficiently stated the essential elements of the underlying felony. *State v. Gunzelman.*

Although instructions 1 and 2 did not designate the underlying felony as "felony aggravated battery," element (3) of instruction 2 instructs the jury that the injury intended by defendant must "[amount] to great bodily harm." The infliction of great bodily harm distinguishes felony aggravated battery from misdemeanor aggravated battery. *See* § 30-3-5(B), (C). Instruction 3 properly defined great bodily harm in accordance with NMSA 1978, UJI Crim. 1.21 (Repl.Pamp.1982).

For the foregoing reasons, the essential elements of felony aggravated battery were given the jury in the first three instructions. This satisfies the requirements of the relevant uniform jury instruction. *See* UJI Crim. 28.28, n. 2 (Cum.Supp.1984).

The word "felony" defined or amplified the crime charged and was not an essential element; failure to use

the word in any instruction was not reversible error, absent a timely objection by defendant. *See State v. Doe,* 100 N.M. 481, 672 P.2d 654 (1983); *State v. Padilla,* 90 N.M. 481, 565 P.2d 352 (Ct.App.1977). We hold defendant has not demonstrated jurisdictional error. *See State v. Urban.*

Defendant bases his claim of fundamental error on the fact that instruction 4 described misdemeanor aggravated battery, which was not an element of the crime charged. Defendant contends that because both forms of aggravated battery were defined in the instructions, the jury could have convicted him of solicitation of misdemeanor aggravated battery, which is not a crime. If so, he reasons, the verdict is uncertain or meaningless and must be reversed. *State v. Buhr; State v. DeSantos.*

The record, however, indicates that defendant offered the instruction of which he complains. He may not base his objection on any instruction given at his own request. *State v. Mills,* 94 N.M. 17, 606 P.2d 1111 (Ct.App.1980). *See also* NMSA 1978, Crim.P.R. 41(d)(Repl.Pamp.1980).

Furthermore, the doctrine of fundamental error does not apply. Instruction 4 distinguished the crime of simple aggravated battery from the crime charged, felony aggravated battery, by providing:

> In New Mexico there is a lesser degree of simple aggravated battery when the injury does not amount to great bodily harm, but which injury, although not likely to cause death or great bodily harm, does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member organ of the body.

During closing argument defense counsel informed the jury that instructions 3 and 4 defined two different crimes,

and that if the jury determined defendant intended Garcia to inflict the lesser degree of harm upon Puentes, then he must be acquitted. The prosecutor also distinguished the two crimes, and argued that the evidence showed defendant intended the greater degree of harm defined in instruction 3. The jury's verdict is not "uncertain or meaningless." *Compare State v. DeSantos* (the prosecutor argued to the jury two clearly inapplicable theories). *See also State v. Doe,* 101 N.M. 363, 683 P.2d 45 (Ct.App.1984).

In addition, the doctrine of fundamental error is rarely applied in a criminal case. *State v. Luna,* 92 N.M. 680, 594 P.2d 340 (Ct.App.1979). This court has applied the doctrine when the defendant's innocence appears indisputable or the question of guilt is so doubtful that to allow the conviction to stand would shock the conscience. *Id. See also State v. Rodriguez,* 81 N.M. 503, 469 P.2d 148 (1970). In the present case, ample evidence supports the verdict.

Defendant's conversations with Garcia contain numerous incriminating statements. Defendant tore five $100 bills in half, gave five halves to Garcia before the hit, and gave Garcia the other five halves after defendant believed the hit had occured. Defendant admitted to making many of the incriminating statements and to giving Garcia a photograph of his intended victim, a Department of Motor Vehicles printout containing information about him, and $500. Because substantial evidence supports defendant's conviction, the doctrine of fundamental error does not apply.

WHETHER THERE WAS SUFFICIENT EVIDENCE OF "GREAT BODILY HARM," AN ESSENTIAL ELEMENT OF THE CRIME CHARGED

The crime of felony aggravated battery requires that the state prove that an accused inflicted injury that caused, or would likely cause, great bodily harm. Section 30-3-5(C); *State v. Ortega,* 77 N.M. 312, 422 P.2d 353 (1966). There must be sufficient evidence to justify a rational trier of fact to find beyond a reasonable doubt that defendant intended that Garcia inflict great bodily harm on Puentes. *See State v. Carter,* 93 N.M. 500, 601 P.2d 733 (Ct.App.1979). Defendant argues there was insufficient evidence that he intended great bodily harm.

In determining whether the state has met its burden of proof, the appellate court must view the evidence in the light most favorable to the jury's verdict and resolve all conflicts and indulge permissible inferences in favor of that verdict. *State v. Chouinard,* 96 N.M. 658, 634 P.2d 680 (1981). It is for the jury to determine the credibility of the witnesses and the weight to be given their testimony. *State v. Vigil,* 87 N.M. 345, 533 P.2d 578 (1975).

The state introduced the transcripts of six surreptitiously recorded conversations between defendant and Garcia. These conversations supported a finding that defendant wanted Puentes to suffer certain injuries. They suggested that defendant wanted Garcia to "fuck up [Puentes'] face real good, or break an arm" and wanted Puentes to wish he was "put away." Defendant stated, "[Y]ou can fuck up his legs so he can't walk . . ." and "That fucker will end up in the hospital for a while, right?" Defendant admitted at trial that the transcripts

of the conversations accurately recounted what he said to Garcia. When asked what the phrase "to put . . . away" meant, defendant responded, "You kill somebody, you put them away."

Defendant claimed he was playing a role and did not really intend that Garcia seriously injure Puentes. Defendant also admitted that he paid Garcia $500 to injure Puentes, but maintained he did so out of fear of what Garcia would do to him if he did not pay the agreed-upon price. The jury was entitled to reject defendant's explanation. *State v. Vigil.*

The jury is entitled to rely upon rational inferences in determining whether an accused inflicted injuries that amounted to great bodily harm. *State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977). The element of intent may be proved by circumstantial evidence. *State v. Robinson,* 94 N.M. 693, 616 P.2d 406 (1980). *See also State v. Ortego,* 79 N.M. 707, 448 P.2d 813 (Ct.App. 1968). Defendant's admissions and explanations created a question of fact for the jury whether he intended injuries that would have amounted to great bodily harm. *State v. Ortega.* The evidence supported an inference that the proposed injuries would have resulted in serious disfigurement or prolonged impairment of the body. *State v. Bell; State v. Ortega.* The jury's verdict was based on substantial evidence, and should not be disturbed by this court. *State v. Robinson.*

WHETHER THE TRIAL COURT MADE A SUFFICIENT DETERMINATION OF THE VOLUNTARINESS OF DEFENDANT'S STATEMENT TO POLICE BEFORE SUBMITTING THE ISSUE TO THE JURY.

Defendant has argued that the trial judge erred in submitting his confession to the jury. Defendant bases his

argument on a claim that the trial judge failed to rule on the voluntary nature of his confession prior to submitting it to the jury. It is undisputed that the judge made no oral or written findings of fact or conclusions of law regarding the voluntariness of defendant's statement.

he jury passes on the voluntariness of a confession only after the judge has resolved the issue against an accused. *State v. Burk*, 82 N.M. 466, 483 P.2d 940 (Ct.App. 1971). The judge's findings upon the disputed issues of fact must be expressly stated or ascertainable from the record. *Id.* An explicit announcement by the trial court on the voluntariness issue is not necessary where the total circumstances as shown by the record lead to the conclusion that such a determination was made. *State v. Soliz*, 79 N.M. 263, 442 P.2d 575 (1968). We hold that the trial court made a sufficient determination on the disputed issues.

The trial court conducted a hearing on the voluntariness of defendant's statement out of the presence of the jury. Officer Allred was the only person to testify at the suppression hearing; defendant offered on evidence to rebut the officer's testimony. Following Allred's testimony at the hearing, the judge adjourned the court for the day without specifically ruling whether defendant's statement was voluntary or not. The next day, before the jury, the judge overruled defendant's objection to Allred's testimony regarding defendant's statement, on the ground that the statement was not voluntary. The judge stated, "The voluntariness of the statement will be considered by the jury. The objection is overruled at this time. You may proceed." The trial judge's overruling of defendant's objection and his decision that the jury would consider the

statement evidences that he had resolved the issue against defendant. *See State v. Soliz; accord State v. Beachum,* 78 N.M. 390, 432 P.2d 101 (1967), *cert. denied,* 392 U.S. 911 (1968); *State v. Stout,* 82 N.M. 455, 483 P.2d 510 (Ct.App. 1971). Since defendant offered no evidence to rebut Allred's testimony, no further statement at the close of Allred's testimony was necessary or appropriate.

If there was doubt about the trial court's ruling, it could have been resolved on request for clarification. The fact that defendant did not find it necessary to complain at trial is further evidence that the trial judge implicitly ruled the statement was voluntary. *See State v. Beachum.*

WHETHER DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, NECESSITATING REVERSAL OF HIS CONVICTION

A defendant is entitled to effective representation of counsel. *State v. Robinson,* 99 N.M. 674, 662 P.2d 1341 (1983). The test for determining whether a defendant has been afforded effective assistance of counsel is whether defense counsel exercised the skill, judgment, and diligence of a reasonably competent defense attorney. *State v. Orona,* 97 N.M. 232, 638, P.2d 1077 (1982); *State v. McGuinty,* 97 N.M. 360, 639 P.2d 1214 (Ct.App.1982). A defendant is not entitled to an errorless defense, and mistakes in tactics or improvident strategy do not necessarily amount to ineffective assistance of counsel. *State v. Orona.* A defendant bears the burden of showing both the incompetency of his attorney and proof that the defendant was prejudiced thereby. *State v. McGuinty.* We hold defendant has not sustained his burden.

Counsel's overall conduct of the defense demonstrated a reasonably diligent and skillful effort. As for the specific allegation that defense counsel's tendering of instruction 4 was in itself ineffective assistance, a review of the whole record does not support this contention. Counsel made a reasonable decision to argue that defendant did not intend great bodily harm. Counsel made a further decision, consistent with the earlier one, to ask the trial judge to instruct the jury on the distinction between the two degrees of harm. These decisions do not demonstrate a lack of competence.

Furthermore, in view of the evidence, it cannot be said that defendant was prejudiced by his counsel's deficient performance, if it was in fact deficient. *State v. McGuinty*. For these reasons, we hold defendant has not sustained his burden of proof on the issue of ineffective assistance of counsel.

CONCLUSION

We hold that the trial judge did not commit fundamental or jurisdictional error in instructing the jury and that there was sufficient evidence of great bodily harm to support the conviction. Further, we hold that the trial court made a sufficient finding of the voluntariness of defendant's statement before submitting it to the jury. Finally, we hold defendant was provided effective assistance of counsel. For these reasons, the conviction is affirmed.

IT IS SO ORDERED.

/s/ Pamela B. Minzner
Judge

WE CONCUR:

/s/ Joe W. Wood
Judge

/s/ A. Joseph Alarid
Judge